

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.525 OF 2001

Shri Parisa Shantappa Upadhye
(Since deceased through his legal heirs)

1. Shri Abhaykumar Parisa Upadhye
Occ: Pujari
2. Shri Pawan Parisa Upadhye
Occ: Pujari & Service
3. Shri Mohan Parisa Upadhye
Occ: Business
4. Shri Bharat Parisa Upadhye
Occ: Business,

(Nos.1 to 4 resident of 47,
C-Ward, Jain Mandir Gangavesh,
Kolhapur)

5. Smt. Shakuntala Suresh Upadhye,
Occ: Household
6. Sou. Indumati Rajkumar Upadhye,
(since deceased without leaving
L.Rs.)

versus

Shri Vishwanath Dadoba Karale,
Occ: Goldsmith,
R/at. 42, D Ward, Gangavesh,
Kolhapur.

..Respondent
(Original Defendant)

Shri A.P.Kulkarni for Mr.A.A.Kumbhakoni for the
Appellant

Mr.M.S.Lagu and Mr. R.S.Apte for the Respondent

Coram : S.R.Sathe, J.
Dated : 17th Aug, 2006

JUDGMENT

1. Appellants, the heirs of original plaintiff Parisa Shantappa Upadhye have preferred this appeal against the judgment and order passed by the 6th Additional District Judge, Kolhapur in Regular Civil Appeal No. 334 of 1994 whereby the judgment and order passed by the trial court dismissing the plaintiffs suit for redemption of mortgage was confirmed and the appeal was dismissed. For the sake of convenience, hereafter the parties shall be referred to as plaintiffs and defendant.

2. Brief facts giving rise to this appeal are as under :

. The suit property bearing City Survey No.290 admeasuring 32.6 sq.mts. situated at Tahsil Karvir, District Kolhapur, was owned by Parisa Shantaram Upadhaye. On 7.10.1969 he mortgaged the said property with defendant for Rs.500/- and mortgage deed was executed. As per the terms and conditions of the said mortgage deed, the defendant was given

possession of the property. However, the same was to be returned on plaintiff paying Rs.500/- to the defendant. The defendant was also to execute the document of reconveyance accordingly. The amount of Rs.500/- was to be repaid within a period of five years. It is the plaintiff's case that the said document was executed merely by way of security for the amount which plaintiff had received from the defendant. According to plaintiff he was ready and willing to pay the amount of Rs.500/-, but the defendant refused to execute the reconveyance deed. Finally the plaintiff issued notice dated 9.12.1980 to defendant through advocate. The defendant gave reply to the same and denied to execute the reconveyance. Hence, on 24.2.1981 the plaintiff filed regular Civil Suit No.195 of 1981 for redemption of mortgage.

3. On 14.3.1988 plaintiff amended the plaint and alternatively submitted that if it is found that the transaction in question was not of mortgage but only there was an agreement to repurchase, then as plaintiff has deposited the amount of Rs.500/- in court it be held that he has performed his part of the agreement and as such the defendant be directed

to execute reconveyance deed and hand over the possession of the suit property to plaintiff.

4. The defendant filed his written statement at Exhibit 11 and contended that the transaction was not of mortgage, but it was sale out and out. He also contended that the plaintiff has received the price of land in question. When he (defendant) purchased the property it was shown in the master plan of Kolhapur City, and he purchased it by taking risk. However, when the said property was found to be deleted from the master plan, plaintiff filed the present suit. The defendant also contended that time was essence of the contract to repurchase and as the plaintiff did not pay the amount of Rs.500/- within the period of five years he is not entitled to get any relief.

5. The defendant further contended that after purchase of the suit property his name has been entered in the record of rights and thus he has become the full owner of the suit property. The defendant, therefore, prayed for dismissal of the suit.

6. On these pleadings the learned trial Judge framed issues at Exhibit 12. In order to prove the suit claim the defendant examined himself at Exhibit 46. Both the parties produced certain documents. After considering the evidence on record, the learned trial judge came to the conclusion that the suit transaction was not of mortgage but it was sale with an agreement to repurchase. He also held that the plaintiff failed to repay the amount within five years period as mentioned in the agreement and as such plaintiff is not entitled to get any relief as prayed. He, therefore, dismissed the plaintiffs suit.

7. After the decision of the said suit the original plaintiff Parisa Upadhye died. Hence his legal heirs filed Regular Civil Appeal No. 334 of 1994 and challenged the order passed by the trial Court. However, the said appeal was also dismissed.

8. Being aggrieved by the said order the legal heirs of original plaintiff have filed the present second appeal. While admitting the said appeal, this Court (Coram V.C.Daga, J.) has passed the following order:

"Admit on the following question of law"

"Whether interpretation of document 7.10.1969 (Exhibit 40) by both the courts below is legal and proper?"

9. In this appeal before me the learned Advocate for the appellant (heirs of original plaintiff) has urged only two points. Firstly, he submitted that both the courts below have not properly appreciated the evidence on record and have wrongly interpreted the document as sale deed with agreement to repurchase. Secondly, he canvassed before me that both the courts below have failed to consider the provisions of Section 58C of the Transfer of Property Act. He submitted that from the perusal of the document itself as well as the circumstances and conduct of the parties it is clear that the transaction was of mortgage. He, therefore, submitted that the appeal be allowed and decree for redemption of mortgage in favour of plaintiff be passed. As against this, the learned Advocate for the respondent, original defendant supported the judgment and order passed by both the

courts below. He submitted that the document in question Exhibit 40 is styled as conditional sale deed and the courts below have rightly held that the transaction was not of mortgage. Secondly, he submitted that as both the courts below have given concurrent finding of fact that the transaction in question was of sale with agreement to reproaches, having regard to the provisions of Section 100 of C.P.C. this court cannot interfere with the said finding of fact. He, therefore, submitted that the appeal be dismissed.

10. It is not in dispute that the suit property was initially owned by the plaintiff. It is also an admitted fact that on 7.10.1969 the transaction with regard to the said property took place between the plaintiff and defendant and the document Exhibit 40 which is titled as "_____"
"_____ (Conditional Sale Rs.500/-) was executed. It is also an admitted fact that by virtue of the said deed defendant was put in possession of the suit property. As per clause No.5 of the said deed it was agreed between the parties that on plaintiff returning the amount of Rs.500/- to defendant within period of five years the

defendant to return the possession and for that he was to execute reconveyance deed. According to plaintiff this was the transaction of mortgage, while it is the contention of the defendant that it was a transaction of sale out and out with an agreement to repurchase.

11. In order to find out whether it was a transaction of mortgage or sale out and out, one has to see the document itself. It is also necessary to see the relevant legal provision i.e. Section 58C of the Transfer of Property Act, 1882. The said provision runs as under :

58(c) Mortgage by conditional sale:- Where, the mortgagor ostensibly sells the mortgaged property:-

on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

on condition that such payment being made the buyer shall transfer the property to the seller,

the transaction is called mortgage by conditional sale and the mortgage a

mortgagee by conditional sale.

(Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.

12. In the instant case it must be noted that for agreement regarding reconveyance no separate document has been executed but the condition with regard to reconveyance on repayment of Rs.500/- has been embodied in the sale deed itself. So, if this circumstance is taken into consideration in the light of Section 58C then apparently it indicates that the transaction must be of mortgage by conditional sale. In a case **Tamboli Ramanlal Motilal v/s. Ghanchi Chimanlal Keshavlal AIR 1992 SC 1236**, Their Lordship have observed :

"Having regard to the nice distinction between a mortgage by conditional sale and a sale with an option to repurchase, one should be guided by the terms of the document alone without much help from the case law.

It is also settled law that nomenclature of the document is hardly conclusive and much importance cannot be attached to the nomenclature alone since it is the real intention which requires to be gathered.

The attendant circumstances could be looked into only to gather the intention. Such an intention, if explicitly expressed in the

document itself, there is no scope for looking at the attendant circumstances. If, therefore, there is no relationship of debtor and the creditor, the question of it being a mortgage by conditional sale does not arise."

. Bearing in mind the above observations of the Apex Court, let us scan the evidence on record to find out as to whether the suit transaction was of mortgage or it was of sale out and out with an agreement to repurchase. At the outset, it must be mentioned that in the document in question Exhibit 40 it is nowhere specifically mentioned that the defendant gave amount of Rs.500/- to plaintiff by way of loan. Nor it is mentioned in the said deed that there was relation of debtor and creditor between the plaintiff and defendant. However, merely because no such specific words have been used we can't jump to the conclusion that the transaction was not of mortgage. Firstly, it must be noted that normally when any person intends to purchase immovable property, and other person intends to dispose of his property by virtue of sale deed, there is no reason for them to mention in the document of sale that if the amount of sale deed is returned to the original vendor then the vendor

would reconvey the property. Normally, in plain and simple transaction regarding sale of property there is absolutely no reason why there should be such clause with regard to reconveyance of the property. The very fact that the purchaser agrees to reconvey the property and that too for the same price after five years indicates that the transaction was not plain and simple that of sale. It is difficult to believe that a person who purchases the property would also agree at the time of purchase itself to reconvey it after some period and that too for same price. If the intention of the purchaser is really to purchase the property then normally he would not agree for such stipulation. In my opinion, such stipulation itself is sufficient to show that the transaction was not of sale, though it was tried to be projected accordingly.

13. Merely because it is not specifically mentioned in the deed in question that the plaintiff will have to pay interest, we can't jump to the conclusion that the transaction is not of mortgage. We have to take into consideration Exhibit 40 as a whole and note the peculiar language used in the document.

14. Turning to the terms and conditions of the document in question Exhibit 40 and the language of the same, it is worth to note that it is mentioned therein "_____

_____ " (At the end of the period or before that, if we return your amount of sale Rs.500/-, after accepting it you have to return the possession in our favour and for that execute reconveyance deed in our favour.") The above mentioned sentence and in particular the word "_____" (return) clearly indicates that the amount which was taken by way of loan was to be returned and thereupon the possession received by the defendant was also to be returned to plaintiff. So, this clearly supports the plaintiff's version that the document in question was executed by way of security for the amount of Rs.500/- given by the defendant to plaintiff and thus it was a mortgage transaction.

15. There are several other circumstances which

also indicate that the transaction must be of mortgage. As mentioned earlier, the defendant has agreed to reconvey the property for the same price even after five years. This assumes importance and when we find that the nature of the property which is open space admeasuring only 32.6 sq. mts. So, this is not a case where the defendant was to get some income by way of any crop etc out of the said land or the property for the period of five years and considering the same, it was agreed that he would reconvey the property for the same amount.

16. Much is made about the fact that after this document Exhibit 40 the name of the defendant was to be entered in the Municipal record and he was to pay the taxes. Such stipulation was in fact necessary considering the nature of document itself. Infact entering his name in record of rights is nothing but a consequential part of the document Exhibit 40 because on 7.10.1969 atleast it was shown that the property is sold to the defendant. So, merely because defendant's name was entered, I am not inclined to hold that the transaction was not of mortgage.

17. It is tried to be argued on behalf of the respondent defendant that there was in fact no need for plaintiff to take loan and to mortgage the property. However, if we carefully read the cross examination of the plaintiff's son as well as of the defendant then it appears that even according to the defendant the financial position of the plaintiff was not good and the plaintiff was a poor person. The defendant himself has stated that his condition was not such that he was in a position to repay the amount of Rs.500/-. So, there is no substance in the argument advanced by the learned Advocate for the defendant in this behalf.

18. Incidentally, it must be noted that prior to this deed the parties had not entered into any agreement for sale which is usually done. Ofcourse, there is no rule of law that agreement to sale must be executed. It is equally true that there are some transactions wherein direct sale deed is executed. But, if we take into consideration this fact coupled with all other circumstances, then it supports the version of the plaintiff.

19. The defendant himself has made very

important statement in his cross examination. He has stated "_____

_____ " (I met plaintiff during five years and asked him to return to me Rs.500/- and get the property back) So this also shows that the real transaction was not of sale deed but the defendant had advanced money and by way of security document in question was executed. If really the transaction would have been of sale, there was no necessity for the defendant to go to the plaintiff and request him to return the amount of Rs.500/-. So, from this sentence also I am inclined to hold that the suit transaction is of mortgage.

20. Plaintiff's witness Pawan who is the son of original plaintiff Parisa and who is also having power of attorney has stepped into the witness box on behalf of the plaintiff. He has categorically stated that he was present at the time of execution of document in question Exhibit 40. He has further stated that defendant had given loan of Rs.500/- to plaintiff and document in question was executed by way of security. Ofcourse, the suggestion has been

put to him that he was not present but the same is categorically denied by him. The defendant has nowhere specifically stated on oath that plaintiff's son Pawan was not present. Under the circumstances, due weightage shall have to be given to the statement of this witness Pawan, from which also it is clear that the transaction was of mortgage.

21. In order to substantiate his argument the learned Advocate for the defendant has placed reliance on the above mentioned earlier case reported in AIR 1992 SC 1236. In that particular case the transaction in question was held to be of sale with an option to repurchase, because of the peculiar stipulation and language used in the said deed. It was clearly mentioned in the said document that the purchaser and his heirs and legal representatives are entitled to use, enjoy and lease the property under the ownership right. Besides this it was also specifically mentioned that if the amount is not repaid within five years then he or his heirs will have no right to take back the said properties. It was also specifically mentioned in the document under consideration in that case that the transferee will have the absolute right to

mortgage, sale or gift the suit property. So, having regard to above mentioned peculiar terms and language used in the said document it was held in that case that the transaction was not of mortgage. While, in the instant case, as pointed out above, the language in the deed in question Exhibit 40 clearly indicates that the transaction was certainly not of pure and simple sale but it was in the nature of mortgage. So, above cited ruling is of no help to the defendant.

22. The learned Advocate for the respondent defendant argued before me that in the instant case there is concurrent finding of fact holding that the suit transaction is of mortgage and as such merely because it is possible to interpret the transaction as that of mortgage the High Court should not discard the concurrent finding of the courts below. For this proposition, he has placed reliance on case of **Vidhyadhar vs. Manekrao AIR 1999 SC 1441**. I have carefully gone through the facts of the reported ruling. In that case the High Court had different view in respect of the circumstances which were already considered by the courts below. While in the instant case I have already pointed out above

that the courts below have not considered the peculiar language used in the document in question. Nor they have considered the aspect of possibility of real purchaser and real vendor entering into such type of transaction, which aspect is considered in the earlier part of this judgment. The courts below have also not taken into consideration at all the important statement made by the defendant noted earlier by me. So, this is a case where both the courts below have failed to take into consideration the peculiar language used in the document in question as well as the other circumstances and the evidence on record. In order to arrive at a legal and proper interpretation of the document in question (Exhibit 40) made by both the courts below ought to have considered all the aspects. The interpretation of the document in question made by the courts below is therefore not legal and correct and as such I am not inclined to accept the same. It is therefore necessary to set aside the order passed by both the courts below. It has already come on record that plaintiff has deposited amount of Rs.500/- in the Court. Having regard to this fact and the fact that the transaction in question is of mortgage, the plaintiff is entitled for

redemption of the same.

23. Hence, the appeal is allowed.

. The judgment and order passed in Regular Civil Appeal No.334 of 1994 is set aside.

. As plaintiff has already deposited the amount of the mortgage money in Court, the defendant to execute reconveyance deed of the mortgage property described in the suit, in favour of appellants and put them in possession of the mortgage property, within two months from today.

. On defendant's failure to execute the reconveyance deed accordingly, the plaintiff to get it executed in execution proceeding by getting Commissioner appointed for that purpose.

. Considering the peculiar facts, parties to bear their own costs.

(S.R.Sathe, J.)